Filed 1/14/19 In re J.R. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.R.-M., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. V.W., Defendant and Appellant.	E070963 (Super.Ct.No. J266308) OPINION

APPEAL from the Superior Court of San Bernardino County. Erin K. Alexander, Judge. Affirmed.

Rich Pfeiffer, by appointment of the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, and Svetlana Kauper, Deputy County Counsel, for Plaintiff and Respondent.

V.W. (mother) is the mother of a preschool-age boy, J.R.-M. (J. or child). She is also the mother of an older girl, D.B.-M. (D.), who lives in Chicago, in the custody of a legal guardian. The mother appeals from an order terminating parental rights to J.[1] She contends:

1. The juvenile court erred by failing to place the child together with D.

2. The juvenile court erred by failing to consider or to order postadoption sibling visitation.

3. Both the mother's trial counsel and J.'s trial counsel rendered ineffective assistance regarding sibling visitation.

4. Under the appellate disentitlement doctrine, San Bernardino County Children and Family Services (CFS) should be barred from participating in this appeal.

We find no error. Hence, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

J. was three when this dependency was filed; he is now five.

D. is the mother's daughter by a different father. Her age is not in the record; however, from a mention of incidents involving her in 2007, she was evidently at least

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[1] The mother has also filed a related petition for writ of habeas corpus (case No. E071239). We ordered the habeas petition considered with (but not consolidated with) this appeal for the purpose of determining whether an order to show cause should issue. We will rule on the petition by separate order.

eight when the dependency was filed in 2016. She lived in Chicago with her legal guardian D.E., who was her aunt on her father's side.[2]

In July 2016, while the mother and the child were riding on public transit, the child was "very fussy and cranky." The mother "smacked" him in the mouth and then "yanked" his leg, causing him to fall backward and to hit his head on a chair. When a bystander tried to intervene, the mother pulled out a taser. Someone called 911. The police responded; they found that the child had no visible injuries. Nevertheless, the mother was arrested, leaving the child temporarily without care.

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[2] In her opening brief, the mother asserts that J. lived with D. "for years," "for almost all of J.'s life," and "until just prior to J.'s detention."

CFS responds that these assertions are not cited to the record and are not, in fact, supported by the record.

These claims are, indeed, not cited to the record; we could therefore disregard them. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Villano v. Waterman Convalescent Hospital, Inc.* (2010) 181 Cal.App.4th 1189, 1196, fn. 4.) The record does show, however, that, when the dependency was filed, D. had been living with D.E. for eight months. It is reasonably inferable that, until then, J. and D. did live together (though not necessarily for almost all of J.'s life), but this refutes the mother's claim that they lived together until just prior to J.'s detention.

In her reply brief, the mother argues that we should consider facts that are stated in her related habeas petition. (She even accuses CFS of obstruction of justice and criminal conspiracy because it did not include these alleged facts in its reports.) She is represented by experienced appellate counsel, however, who should know that "'[w]hen practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two.'" (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609, fn. 11.)

The mother herself had been in foster care between the ages of 2 and 18. She admitted using methamphetamine "off and on for years" — most recently, about two weeks earlier.

CFS detained the child and filed a dependency petition concerning him. He was placed in a foster home.

At a hearing in August 2016, the mother's counsel requested that the social worker "assist" D. in talking to J. on the phone. She represented that "[D.] would like to talk to J[.] over the phone." The juvenile court responded, "I'll authorize some contact with an out-of-state sibling." The resulting minute order stated that the juvenile court "authorized" the social worker to "facilitate" phone calls between J. and D.

At the jurisdictional/dispositional hearing, the mother pleaded no contest. The juvenile court sustained jurisdiction based on a risk of serious physical harm (§ 300, subd. (a))[3] and failure to protect (§ 300, subd. (b)). It formally removed the child from parental custody and granted the mother reunification services.

The mother abandoned her drug treatment plan and missed visits with the child.

In the report for the six-month review hearing, the social worker indicated that placement with D.E. had been considered but rejected: "Placement out-of-state with the sibling would interfere with reunification for the family."

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[3] This and all further statutory citations are to the Welfare and Institutions Code.

Social worker's reports, dated February 2017 and August 2017, respectively, stated that "[t]he child has not visited with his half-sibling."

In September 2017, at the 12-month review hearing, the juvenile court terminated reunification services and set a section 366.26 hearing.

In October 2017, the child was placed with foster parents who were interested in adopting him.

In July 2018, at the section 366.26 hearing, the juvenile court terminated parental rights. It did not address sibling visitation.

II

THE MOTHER'S NOTICE OF APPEAL

Preliminarily, CFS contends that the mother has forfeited any challenge to the termination order because her notice of appeal did not purport to appeal from it.

She filed her notice of appeal in pro. per. After the words, "The order appealed from was made under Welfare and Institutions Code (*check all that apply*)," she did not check the box that would have indicated that she was appealing from an order under section 366.26. Instead, she checked other boxes that were inapplicable to her situation.

A notice of appeal is supposed to "identif[y] the particular judgment or order being appealed." (Cal. Rules of Court, rule 8.100(a)(2); see also *In re Josiah S.* (2002) 102 Cal.App.4th 403, 418.) However, "[i]t is a rule both ancient and sound that '[n]otices of appeal are not strictly construed, and an appeal will not be dismissed because of a misdescription of the judgment or order to which it relates unless it appears

that the respondent has been misled by such misdescription.' [Citations.]" (*Dang v. Smith* (2010) 190 Cal.App.4th 646, 656-657.)

Here, the section 366.26 orders were entered on July 24, 2018. That same day, the mother filed her notice of appeal. On the first page, it stated, "I appeal from the findings and orders of the court . . . ." The space for the date of the orders was left blank. At that point, the only appealable orders extant were the section 366.26 orders. It was only on the second page, and then only in connection with the applicable section(s) of the Welfare and Institutions Code, that the mother misdescribed the orders. CFS does not claim that it was misled or otherwise prejudiced by the notice of appeal. Hence, this description was close enough.

III

RELATIVE PLACEMENT

The mother contends that the juvenile court erred by failing to place the child with D.E., in Chicago, which would have allowed him to be with his sibling D.

She relies on the relative placement preference, section 361.3. This statute, as relevant here, provides: "In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative . . . ." (§ 361.3, subd. (a).) It also provides: "[W]henever a new placement of the child must be made, consideration for placement shall again be given as described in this

section to relatives who have not been found to be unsuitable and who will fulfill the child's reunification or permanent plan requirements." (§ 361.3, subd. (d).)

The mother forfeited this contention, in two respects.[4]

First, she failed to raise it below. "[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.] [¶] Dependency matters are not exempt from this rule. [Citations.]" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. omitted.)" In particular, a parent who is asserting a failure to follow the relative placement preference must have raised it in the trial court. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 53-54.) At the detention hearing, the mother did ask that "an aunt" (which may or may not refer to D.E.) be considered for placement. After that, however, she never objected that placement with D.E. had not been adequately considered.

Second, she failed to appeal from any of the juvenile court's orders prior to the section 366.26 hearing. (*In re A.K.* (2017) 12 Cal.App.5th 492, 501.) "If an order is appealable, . . . and no timely appeal is taken therefrom, the issues determined by the order are res judicata. [Citation.]" (*In re Matthew C.* (1993) 6 Cal.4th 386, 393 [24 Cal.Rptr.2d 765, 769-770.) Thus, the juvenile court's previous placement orders cannot

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[4] The mother does not contend that the forfeiture constituted ineffective assistance of counsel.

be challenged in this appeal. At the section 366.26 hearing, there was no issue as to change of placement, and hence there was no reason to reconsider placement with D.E.

Even if not forfeited, this contention lacks merit. The relative placement preference did not apply to placement with D.E., once again for two reasons.

First, D.E. was not a "relative" within the meaning of section 361.3, because J. and D. had different fathers. "'Relative' means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words 'great,' 'great-great,' or 'grand,' or the spouse of any of these persons . . . ." (§ 361.3, subd. (c)(2).) D.E. was D.'s aunt, on D.'s father's side; she was not J.'s aunt.[5]

Rather, D.E. was a "nonrelative extended family member" (NREFM), as defined in section 362.7. A child may be placed with a NREFM (*ibid.*), but a NREFM is not entitled to the same preferential consideration as a relative. The mother does not argue that the criteria for placement with a NREFM were not properly applied, and thus she has forfeited any such contention.

Second, the record shows no "request by" D.E. for placement. The mother states that "D[.E.] . . . requested placement at the outset of the case," but not so. At the detention hearing, *the mother* asked that "an aunt" be assessed for placement. However, there is no evidence in the record that *D.E. herself* ever requested placement. The social

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[5] The child's sibling D. cannot be viewed as the relevant "relative," because "relative" is defined as an "adult." (§ 361.3, subd. (c)(2).)

worker spoke to D.E. on the phone before the detention hearing, but in that conversation, as far as the record shows, D.E. did not request placement.

In her reply brief, the mother argues that CFS did not adequately document its consideration of and its communications with relatives, and hence it cannot meet its burden of proving that it complied with various requirements applicable to such consideration and communications. She also argues that, at the dispositional hearing, the juvenile court failed to make a finding as to "whether the social worker has exercised due diligence in conducting the required investigation to identify, locate, and notify the child's relatives," as required by California Rules of Court, rule 5.695(e)(1).

"The[se] argument[s] [are] untimely because [they are] asserted for the first time in the reply brief. [Citation.]" (*In re Luke H.* (2013) 221 Cal.App.4th 1082, 1090.) """""Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission."""" [Citation.]" (*Donorovich-Odonnell v. Harris* (2015) 241 Cal.App.4th 1118, 1141.)

IV

SIBLING VISITATION DURING THE DEPENDENCY AND AFTER ADOPTION

The mother contends that the juvenile court erred by failing to consider or to order postadoption sibling visitation. Under this heading, she also tries to contend that the

juvenile court erred by failing to ensure that telephonic sibling visitation took place during the dependency.

The mother does not cite any legal authority requiring the juvenile court to consider postadoption sibling visitation at or before the section 366.26 hearing.

She does cite two statutes. The first, section 16002, subdivision (e), provides: "If parental rights are terminated and the court orders a dependent child or ward to be placed for adoption, the county adoption agency . . . shall take [certain specified] steps to facilitate ongoing sibling contact . . . ." These steps include meeting with the prospective adoptive parents, the child, and the sibling to consider a voluntary postadoption sibling contact agreement. (*Id*., subd. (e)(3)(A).)

The second statute, section 366.29, provides that: "With the consent of the adoptive parent or parents, the court may include in the final adoption order provisions for the adoptive parent or parents to facilitate postadoptive sibling contact." (*Id*., subd. (a).)

Both statutes, by their terms, apply only after parental rights have been terminated. Our record stops at the termination order. Thus, the mother cannot show that the prescribed steps were not taken. Moreover, even if they were not, that would not be grounds to reverse the termination order.

In addition, the mother cites *In re Cliffton B.* (2000) 81 Cal.App.4th 415. There, however, the court merely stated: "When the juvenile court terminates parental rights and refers a child for adoption, it retains jurisdiction over that child until the adoption is

effected. During that interim period, the juvenile court can make visitation orders as it sees fit, and sibling contact should remain the subject of its concern." (*Id*. at p. 427.) This is consistent with our view that the juvenile court is not required to address postadoption sibling visitation at the section 366.26 hearing itself.

Throughout her argument, the mother complains that the juvenile court and CFS failed to ensure that telephone visits actually took place. We disregard these complaints, because they are beyond the scope of the captions under which they appear. A brief must "[s]tate each point under a separate heading or subheading summarizing the point . . . ." (Cal. Rules of Court, rule 8.204(a)(1)(B).) "Arguments not raised by a separate heading in an opening brief will be deemed waived. [Citations.]" (*Winslett v. 1811 27th Avenue, LLC* (2018) 26 Cal.App.5th 239, 248, fn. 6.) The mother's complaints about sibling visitation appear under the heading, "The juvenile court erred in not considering continued post-adoption sibling visitation pursuant to section 16002" and the subheading, "The trial court erred in not ordering postadoption sibling visitation pursuant to section 16002." (Capitalization altered.) These cannot be construed to encompass an issue regarding sibling visitation during the dependency.

In any event, the mother's counsel forfeited this issue by failing to raise it below. (*In re Anthony P*. (1995) 39 Cal.App.4th 635, 641 ["Appellant has waived her right to assert error as to sibling visitation on appeal by not properly raising the issue below."].) The mother claims that she did raise it, by requesting telephone visits. When she requested them, however, the juvenile court authorized them. Later, when (and if) they

did not actually occur, her counsel did not ask the trial court to step in. We can hardly fault the juvenile court for not doing something that it was never asked to do.

The mother also argues that "any objection would have been futile because [CFS] had made up its mind that it was not going to facilitate any sibling contact . . . ." This assumes that CFS's failure to arrange telephone visits was malicious rather than just negligent (or perhaps even outside of its control). The record does not support this jaundiced view; when the mother requested telephone visits, CFS did not object. In any event, assuming for purposes of argument that CFS was stubbornly opposed to any sibling visitation whatsoever, that would have been the best reason in the world for the mother's counsel to call on the juvenile court to intervene. There is no evidence to suggest that such a request would have been futile.

V

INEFFECTIVE ASSISTANCE OF COUNSEL

The mother contends that both her trial counsel and J.'s trial counsel rendered ineffective assistance. In her opening brief, she does not clearly specify what act or omission this contention is based on, except that it relates to sibling visitation somehow. In her reply brief, however, she identifies it as the "fail[ure] to follow up on J. not being able to communicate with his sister." We accept this as a reasonable clarification of her opening brief.[6]

[6] At one point, she identifies the ineffective assistance as the failure to "fil[e] a writ petition challenging the failure to provide sibling visitation" after the 12-month review hearing. As already discussed, a writ petition would have had no merit, because

"To succeed on a claim of ineffective assistance of counsel, the appellant must show (1) counsel's representation fell below an objective standard of reasonableness; and (2) the deficiency resulted in demonstrable prejudice. [Citations.]" (*In re Kristen B.* (2008) 163 Cal.App.4th 1535, 1540-1541.)

"'"[T]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'"' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051.) Hence, "[w]hen a claim of ineffectiveness of counsel is raised on appeal, we examine the record to determine if there is any explanation for the challenged aspects of representation. If the record sheds no light on why counsel failed to act in the manner challenged, the case is affirmed 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .' [Citations.]" (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 255.)

Preliminarily, CFS contends that the mother has no standing to assert ineffective assistance by minor's counsel. Cases on this issue are in conflict. (Compare *In re S.A.* (2010) 182 Cal.App.4th 1128, 1133-1135 [parent lacked standing to assert ineffective assistance by minor's counsel, even though it assertedly prejudiced the parent at the jurisdictional hearing] with *In re Barbara R.* (2006) 137 Cal.App.4th 941, 952 [parent had standing to assert ineffective assistance by minor's counsel, because it assertedly

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her counsel had never raised CFS's failure to provide sibling visitation as an issue below. It is inferable, however, that what she is really objecting to as ineffective assistance is counsel's failure to raise the issue.

prejudiced the parent in the setting of a section 366.26 hearing].) In *In re Daniel H.* (2002) 99 Cal.App.4th 804, however, we held that a parent has standing to assert ineffective assistance by minor's counsel if it "actually affected the parent's interests." (*Id.* at p. 811.) We added that a parent "probably" has standing to assert that minor's counsel's failure to seek sibling visitation constituted ineffective assistance of counsel. (*Ibid.*) We explained that "[b]ecause sibling relationships are . . . a statutory exception to adoption, those relationships directly impact the parent's interest in reunification . . . ." (*Id.* at pp. 811-812; see § 366.26, subd. (c)(1)(B)(v).) While this was dictum, it was dictum of this court, and we will presume it was correct.

But here, there could have been any number of sound tactical reasons for counsel's omission. For example, while the mother's counsel claimed that D. wanted to talk to J., perhaps J. did not want to talk to D. Or, more likely, counsel could have concluded that mere phone calls were very unlikely to result in a meaningful sibling relationship. After all, J. was only three years old, D. was much older than he was, he and D. had already been separated for at least eight months, and face-to-face visitation was not an option because D. was in Chicago. The social worker reported that "[t]he children share no emotional bond or common experiences."[7]

[7] The mother calls this "erroneous[]"because J. and D. had lived together. (See fn. 2, *ante*.) As D. was older than J., however, they did not necessarily share a lot of experiences. And again, J. had not seen D. for at least eight months - a long time in a three-year-old's life.

For the same reason, the mother cannot show prejudice; she cannot show that, if there had been telephone visits, the siblings would have developed a relationship so significant that it would have prevented termination of parental rights. She asserts that "had sibling visitation been initiated at the outset as was requested, it is likely D[.E.] would have been considered for placement to keep the siblings together." CFS did consider placement with D.E., however, but decided against it: "Placement out-of-state with the sibling would interfere with reunification for the family."

In her reply brief, the mother raises, as additional instances of ineffective assistance, counsel's failure to investigate the sibling relationship and failure to request relative placement at the section 366.26 hearing. We disregard these contentions because they were not raised in the opening brief. (See part III, *ante*.)

Also in her reply brief, the mother argues that she was prejudiced by ineffective assistance of *CFS*'s attorneys. She forfeited this contention, too, by failing to raise it in her opening brief. In any event, there is no authority for the proposition that a parent has standing to assert ineffective assistance by counsel for the social services agency. (See *In re Jessica B*. (1989) 207 Cal.App.3d 504, 512-513.)

We therefore conclude that the mother has not shown any ineffective assistance of counsel.

VI

MISCELLANEOUS CONTENTIONS

In the "Introduction" to her brief, the mother takes umbrage at the lack of "continuity" of the parties' attorneys. She lists (though without citation to the record) five attorneys who appeared for her,[8] seven for the child, and four for CFS. She expresses the hope that "this Court will state the importance in keeping the same attorneys on a child dependency case whenever possible."

She does not appear to assert, however, that this lack of continuity constituted reversible error of any kind. The captions in her brief do not raise any argument relating to it. (See part V, *ante*.) She does assert that her counsel and minor's counsel rendered ineffective assistance, but she concedes that multiplicity of attorneys "is not an automatic demonstration of ineffective assistance of counsel."

"'The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court.' [Citation.]" (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 860.) We therefore decline to discuss this aspect of the case further.

Also in her "Introduction," the mother criticizes the juvenile court and counsel for delaying the section 366.26 hearing for over five months so the social worker could further investigate the child's Indian heritage for purposes of the Indian Child Welfare

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[8] In her reply brief, she claims there were six, but her opening brief lists only five.

Act. Once again, however, she does not appear to assert that this constituted reversible error. Hence, we do not address it.

VII

APPLYING APPELLATE DISENTITLEMENT AGAINST CFS

The mother contends that, under the appellate disentitlement doctrine, CFS should be barred from participating in this appeal.

Under the appellate disentitlement doctrine, "an appellate court may stay or dismiss an appeal by a party who has refused to obey the trial court's legal orders." (*In re A.K.* (2016) 246 Cal.App.4th 281, 284.) "'"In dependency cases, the doctrine has been applied only in cases of the most egregious conduct by the appellant, which frustrates the purpose of dependency law and makes it impossible to protect the child or act in the child's best interests."' [Citation.]" (*In re Molly T.* (2018) 27 Cal.App.5th 538, 546.)

The mother cites no authority for applying the disentitlement doctrine against a respondent. Because the application of the doctrine normally results in the stay or dismissal of the appeal, it is not well-designed for such use.

We need not decide, however, whether the doctrine *could* apply to CFS, because we conclude that it *does* not.

The only order that the mother accuses CFS of violating is the juvenile court's order regarding sibling phone calls. That order, however, merely stated: "Social worker *authorized* to facilitate sibling phone calls between minor and out of state sibling." (Capitalization altered, italics added.) It did not *require* the social worker to do anything.

In addition, the record does not show that the social worker did, in fact, fail to *facilitate* phone calls. The mother never asserted this failure below. Accordingly, we have no evidentiary record as to why the calls did not take place. For all we know, J. refused to talk to D., or vice versa, or D.E. refused to cooperate in arranging the calls.

Indeed, on this record, we cannot even say with certainty that phone calls did not take place. Two social worker's reports stated that the child had not "visited" the sibling, but it is not clear whether this includes telephone visits. A third social worker's report did not discuss sibling visitation or contact at all.

At worst, the social worker violated the spirit, although not the letter of the order. However, this is not sufficient to bring down the wrath of the disentitlement doctrine on CFS's head. Like contempt (see *Weber v. Superior Court* (1945) 26 Cal.2d 144, 148), the disentitlement doctrine cannot be based on an order that is uncertain or ambiguous.

We therefore decline to apply the doctrine.

VIII

DISPOSITION

The orders appealed from are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

FIELDS

J.

RAPHAEL

J.